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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1034

BETTY N. EMBRY,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Betty N. Embry respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 21, 1971.

OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas (A. 43) is unreported. The opinion of the Court of Appeals for the Tenth Circuit (A. 17) is reported at 451 F.2d 472.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 21, 1971. A timely petition for rehearing was denied on November 26, 1971, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. (A) Must federal courts give full faith and credit under 62 Stat. 947, 28 U.S.C. § 1738 to a determination of fact in a prior state court judgment between the same parties, under the doctrine of collateral estoppel, where the causes of action in the two proceedings are different?

(B) If so, did the Court of Appeals fail to give full faith and credit to a state court judgment determining that an automobile accident aggravated pre-existing arteriosclerosis in E. Ned Embry, and that his death was "caused by, and accelerated and precipitated" by an accident?

2. Did the Court of Appeals fail to apply applicable Kansas law that accidental aggravation of pre-existing disease, such as arteriosclerosis, which accelerates or precipitates death, constitutes accidental death under accidental indemnity clauses in insurance policies, in violation of the Rules of Decision Act?

STATUTES INVOLVED

62 Stat. 947, 28 U.S.C. § 1738:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

62 Stat. 944, 28 U.S.C. § 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

The action below was brought by petitioner Betty N. Embry as beneficiary of four life insurance policies issued to E. Ned Embry by respondent The Equitable Life Assurance Society of the United States. The action was filed in the District Court of Sedgwick County, Kansas, and was removed by Equitable to the United States District Court for the District of Kansas, under 28 U.S.C. 1441, there being diversity of citizenship. (A. 17-18).

The insurance policies contained typical accidental death provisions, and provided a total of $75,000.00 in benefits in the event E. Ned Embry's death was caused by

accidental means, and death ensued within 90 days after the injuries suffered.[1]

On May 23, 1963, E. Ned Embry, aged 51, was injured in an automobile accident in which the impact of his chest bent the steering wheel and broke the steering column. (A. 20). Prior to this time, Embry appeared to be in good health, and was an active, robust sportsman. Thereafter, Embry suffered from chest pains, nausea and apparent indigestion until June 24, 1963, when he suffered a heart attack and died. The autopsy disclosed he had advanced arteriosclerosis. (A. 2-4, R. 89-96).

A question immediately arose whether Embry's injuries in the automobile accident aggravated the pre-existing arteriosclerosis, so as to precipitate the heart attack, and thus accelerated and caused Embry's death.

The question was pertinent in two ways: (1) At the time of the accident, and his death, Embry was employed by Equitable as state agency manager, and Mrs. Embry was eligible for state workmen's compensation benefits if death was caused by the accident.[2] (2) Under Kansas law, benefits would be owing under the accidental death insurance policies if Embry's accident aggravated a pre-existing

---

1. A typical clause in these four policies defined death from accident as "death resulting solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means and ensuing within 90 days of such injuries, but does not include death resulting from or caused directly or indirectly by . . . disease or illness of any kind, physical or mental infirmity. . ." (A. 18-19).

2. K.S.A. 44-501 provides: "*The obligation.* If any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall . . . be liable to pay compensation to the workman in accordance with the provisions of this act. . . ."

dormant disease, thus accelerating and causing death, even though death would not have occurred but for the disease.[3]

After Embry's death, and prior to this action, Mrs. Embry filed a workmen's compensation action in Kansas seeking accidental death benefits. Accidental death benefits were awarded to Mrs. Embry in a judicial proceeding by the Kansas Workmen's Compensation Director. (A. 11). Equitable then sought review of the award in a *de novo* action in the District Court of Rush County, Kansas. (A. 1). The state district court found:

> "3. The injury sustained in the automobile accident on May 23, 1963, aggravated a prior existing physical condition, and accelerated and precipitated his death on June 24, 1963.
>
> "4. The death of Embry on June 24, 1963, was caused by, precipitated and accelerated by the accidental injury Embry suffered on May 23, 1963. . . ." (A. 10).

Those findings were not appealed, and the judgment entered against Equitable became final. The judgment was a judicial determination by a state court of general jurisdiction, and the action for compensation benefits was contractual in nature. *Gawith* v. *Gages Plumbing & Heating Co., Inc.*, 206 Kan. 169, 476 P.2d 966 (1971).

After Equitable denied Mrs. Embry's claim for accidental death benefits under the four policies, she commenced this suit, her petition asserting the prior state court judgment deciding that Embry's accident had aggravated his pre-existing arteriosclerosis, and had accelerated and caused his death, was a final adjudication of a fact issue between the parties which was binding in this litigation.

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3. *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765 (1967).

(R. 13-26). The district court rejected this position in overruling Mrs. Embry's motion for summary judgment (A. 43), and in overruling her motions for judgment and a directed verdict at trial. The issue was tried to a jury wherein the evidence, presented at great length (R. 89-386), was substantially the same as that presented in the prior state court action. (A. 1-16). Equitable, using the same medical witnesses, also hired additional medical experts, all of whom were permitted to testify at length that Embry's accident had nothing to do with his death, and did not aggravate his pre-existing arteriosclerosis. (A. 34, 40). Mrs. Embry again presented substantial medical evidence to the contrary. (A. 36).

The jury did not return a general verdict, but returned a special verdict which stated:

> "We, the Jury, find the death of E. Ned Embry was not proximately caused by the accident of May 23, 1963." (A. 53).

Mrs. Embry appealed to the Court of Appeals, which affirmed the district court. (A. 17). Its opinion attempts to justify the permitted relitigation of the fact issue pertaining to the accidental aggravation of Embry's arteriosclerosis and the accidental cause of his death by holding that an additional fact issue was presented in this action pertaining to the dormancy of Embry's disease:

> "We are of the opinion that the issues presented for determination by the jury were:
>
> "Was the advanced arteriosclerosis disease of Embry's coronary arteries, which caused the infarct, dormant at the time of the accident; *and did the accident aggravate or energize such dormant disease*, or was such disease advanced, active, progressive, and energized prior to and at the time of the accident." (A. 41, 451 F.2d at 484). (Our emphasis).

At another point in its opinion, the Court of Appeals ignores the primary issue regarding "aggravation" of the disease, and appears to consider the "dormancy" of such disease as the sole issue (A. 28), although the opinion later recognizes both were submitted to the jury in this action. (A. 41).

The opinion below, thus, failed to give any binding effect to the prior state court judgment that the accident did aggravate Embry's pre-existing disease, and did accelerate, precipitate and cause his death. This fact issue was the major focus of the evidence by both parties in this subsequent action, as well as the prior action. We believe this resulted in a denial of full faith and credit required by 62 Stat. 947, 28 U.S.C. § 1738.

The issue of whether Embry's arteriosclerosis was "dormant" was not involved nor determined in the prior state court action. But Kansas law is clear that advanced arteriosclerosis is considered "dormant" as a matter of law in determining benefits under accidental death clauses. The failure of the court below to apply that law denies Mrs. Embry her rights under the Rules of Decision Act, 62 Stat. 944, 28 U.S.C. § 1652.

REASONS FOR GRANTING THE WRIT

I. Whether the Full Faith and Credit Clause of 28 U.S.C. § 1738 Includes the Doctrine of Collateral Estoppel, Raises an Important Question of Federal Law Affecting All Federal Courts, Which Should Be Definitively Determined by This Court.

The Court of Appeals refused to recognize in this action the binding nature of a fact adjudication by the state court that Embry's accident aggravated his pre-existing arteriosclerosis, and that his death was "caused by, precipitated and accelerated by" the accident. The Court

of Appeals recognized that such issue was of major significance in the present action, but refused to accord it full faith and credit simply because an additional and separate issue relating to "dormancy" of Embry's disease was presented for the first time in this action.

The full faith and credit clause requires that the state court judgment be given the same effect in any Federal court as that which it has "by law or usage in the courts" of Kansas. In Kansas, death from accidental aggravation of a dormant disease is regarded "as being caused solely by the injury, so as to render insurer liable therefor, even though the death . . . might have resulted at a later period regardless of the injury, and even though the accident would not have had such an effect on a normal person." *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 55, 434 P.2d 765, 769 (1967).[4] The same case makes clear that the fact issues of "aggravation", and "dormancy", of the disease are separate issues, since the two issues were presented to the jury by separate special interrogatories. (200 Kan. at 56, 434 P.2d at 769-770).

The Kansas Supreme Court holds that any "fact . . . directly in issue and judicially determined in a former suit is conclusively settled by the judgment. . . ." *Lyon* v. *Harrison*, 127 Kan. 318, 273 Pac. 429 (1929). Clearly the Kansas courts would give conclusive effect to the state court judgment that Embry's accident aggravated his disease, and caused and accelerated his death, in any future action between the parties. Yet Mrs. Embry, in this action, was required at great expense to relitigate that very fact issue, and the jury was permitted to make a contrary finding on that issue. The full faith and credit clause was intended to prohibit that result.

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4. The holding was made with regard to an accidental disability clause of the same type as the accidental death clauses involved in this action.

The progenitor of 28 U.S.C. § 1738 was enacted by the First Congress in 1790, 1 Stat. 122. This Act extended the rule of the full faith and credit clause of the Constitution (Art. IV, § 1) to all courts, federal as well as state. *Mills* v. *Duryee*, 7 Cranch 481 (1813); *Davis* v. *Davis*, 305 U.S. 32 (1938). The Act has been applied to a variety of cases and questions. E.g., *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Milwaukee County* v. *White Co.*, 296 U.S. 268 (1935); *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Durlacher* v. *Durlacher*, 123 F.2d 70 (9 Cir. 1941), cert. denied, 315 U.S. 805; *Wayside Transp. Co.* v. *Marcell's Motor Express, Inc.*, 284 F.2d 868 (1 Cir. 1960); *Porter* v. *Wilson*, 419 F.2d 254 (9 Cir. 1969), cert. denied, 397 U.S. 1020.

The very terms of the statute appear to require federal courts to give full faith and credit to state court judgments deciding issues of fact between the parties, although the second action may involve a different cause of action. For the full faith and credit to be given is that same credit which the judgment has "by law or usage in the courts of such State . . .". By this clause, local doctrines of *res judicata* become a part of national jurisprudence, and therefore federal questions. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349 (1942).

In Kansas, wherein the prior judgment against Equitable was rendered, collateral estoppel is applied with vigor to prior judgments. In *Lyon* v. *Harrison*, 127 Kan. 318, 273 Pac. 429 (1929), the Kansas Court held:

> "The general rule is that a fact or question directly in issue and judicially determined in a former suit is conclusively settled by the judgment therein and cannot be reiitigated between the same parties or their privies in the same or any other court upon the same or a different cause of action. . .

> "It is not material that the second suit differed from the first as to form or cause of action, where the right, question or fact was put in issue and was definitely determined in the first action." (Syllabuses 1 and 2 by the Court).

The clear import of *Johnson* v. *Muelberger*, 340 U.S. 581 (1951), is that full faith and credit must be given to a prior judgment although the second suit is on a cause of action different from that involved in the first, where the laws of the state wherein the first judgment was rendered make the first determination binding. This Court held that a Florida divorce decree could not be collaterally attacked in a New York state court by the daughter and legatee of the deceased divorced father. Since the state courts of Florida would make the divorce decree binding on the daughter, the New York courts were required to do likewise. This Court stated:

> ". . . From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit to be given is not to be niggardly but generous, full." (340 U.S. at 584).

However, that case involved a jurisdictional attack on the validity of the total divorce judgment, not, as here, an attempt only to relitigate a fact issue previously decided. See also *Chicago, R.I. & P. R. Co.* v. *Schendel*, 270 U.S. 611, 617 (1926); *Sutton* v. *Lieb*, 342 U.S. 402 (1952).

Thus, although this Court has not definitively stated that the doctrine of collateral estoppel, as such, is included in the full faith and credit clause, the language of the stat-

ute, and the interpretation given it, appear to require that result. This, indeed, is the holding of those few lower courts which have specifically considered the question. As stated by the Court of Appeals for the Third Circuit in *United States* v. *Silliman*, 167 F.2d 607, 620-621 (3 Cir. 1948), cert. denied, 335 U.S. 825:

> ". . . The full faith and credit clause 'compels that controversies be settled so that where a state court has jurisdiction of the parties and subject matter the judgment controls in other states to the same extent as it does in the state where rendered.' Therefore, this decree prevents the litigation of a matter already determined in New York in the courts of another state *for the collateral estoppel division of res judicata is included within that clause.* And, although judicial proceedings in the Federal Courts were not explicitly included within the language of the Constitution, it has been held by the Supreme Court that full faith and credit must be afforded to a state court's judgment when brought into relevancy in a Federal tribunal." (Our emphasis).[5]

Professor Vestal, to promote clarity, has divided judgment preclusion into claim preclusion (bar and merger) and issue preclusion (collateral estoppel). He takes the view that full faith and credit requires "the same preclusive effect . . . in terms of issue preclusion, claim preclusion, the parties or persons covered, and the issues involved" as that given in the state wherein the first judgment was rendered. Vestal, "The Constitution and Preclusion/Res Judicata", 62 Mich. L. Rev. 33, 38 (1963). If this be so, the Court of Appeals doubly failed to give full faith and credit: (1) It failed to delineate the separate

5. In accord are *Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F.2d 82 (3 Cir. 1941), and *Williams* v. *Ocean Transport Lines, Inc.*, 425 F.2d 1183 (3 Cir. 1970).

issues of "aggravation" and "dormancy", and it then (2) failed to give full faith and credit to the state court judgment adjudicating the fact issue of "aggravation". For Kansas recognizes the separateness of these issues, *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 56, 434 P.2d 765, 769-770. Full faith and credit requires that what the State has separated, a Federal court cannot join together.

In a later study, Professor Vestal vividly describes the increasing importance of issue preclusion under collateral estoppel in the federal courts. Vestal, "Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts," 66 Mich. L. Rev. 1723 (1968). He rightly observes that "[t]he law of preclusion is in a state of flux at the present time", and that "[i]n federal courts there has been uncertainty about the law of preclusion to be applied." 66 Mich. L. Rev. at 1749, 1750. He further suggests an urgent need for federal courts to use a "vital, growing concept of preclusion" and that "[a]nything less would be an abdication of the federal courts' leadership role," in view of overloaded court dockets and complexity of modern litigation. 66 Mich. L. Rev. at 1750, and 1723-1724.

The importance of properly applying collateral estoppel was noted by this Court in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), a criminal case:

> "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . ."

Moreover, the rule of collateral estoppel "is not to be applied with the hypertechnical and archiac approach of a 19th century pleading book, but with realism and rationality." *Ashe* v. *Swenson*, supra, at 443.

Petitioner suggests it is appropriate for this Court to decide definitively that this important rule of our judicial system is, indeed, a part of the requirement of the full faith and credit clause, so as to give clarity and direction to both federal and state courts in this area so essential to efficient court administration.

Although the Court of Appeals' opinion recognized that a major fact issue in this case was whether the accident aggravated Embry's disease, it declined to give full faith and credit to the state court judgment, merely because another issue relating to dormancy of the disease was presented for the first time. This holding totally eviscerates the principle of collateral estoppel. If the presence of a new issue in a subsequent case involving a different cause of action is sufficient to justify ignoring a judicial fact determination on another issue common to both actions, the benefits encompassed by collateral estoppel are destroyed. In effect, a prior judgment would, in that event, be binding only when all issues common to both actions were previously decided.

It is sufficient to say this result is contrary to the terms of the full faith and credit clause, since Kansas recognizes the conclusive effect of any fact determination in any future action between the parties. The limited, unrealistic concept of issue preclusion applied by the Court of Appeals does not meet the full faith and credit test. The evidentiary Record in this case (the printed Appendix in the Court of Appeals), demonstrates the resulting unwarranted expense and delay of relitigation caused to the parties, and to the judicial system. That this action was filed in state court and removed to federal court serves

to emphasize the discrimination against Mrs. Embry solely as a result of being in federal court.

The Court of Appeals' lengthy recitation of conflicting evidence on the causation issue, largely immaterial to the legal issues before it, appears to evince a distrust of the state court judgment on the issue of causation. The opinion pointedly omits significant portions of testimony from Mrs. Embry's medical witnesses. (R. 179-182, 224-227). But the very purpose of the full faith and credit clause was to prevent second-guessing of this sort, no matter how "wrong" the first judgment is thought to be.

A definitive ruling on this question would tend to have the salutary effect of preventing relitigation of issues in overburdened federal courts, and would provide direction and clarity now lacking. From petitioner's standpoint, it would insure to her a valuable right granted by a statute of basic importance in our federal-state system of government and law.

II. The Failure of the Court of Appeals to Apply Applicable Kansas Law That Arteriosclerosis Is a "Dormant" Disease Is in Violation of the Rules of Decision Act, Which Has a Widespread Impact in Kansas and Other States Affecting All Insurance Policies Containing Accidental Indemnity Clauses.

The Court of Appeals held that the question of dormancy of Embry's arteriosclerosis was a jury question (A. 41), despite the fact that Embry, prior to the accident, appeared to be in excellent health and was not disabled in any way. (R. 89-96). This holding failed to apply Kansas law that arteriosclerosis, though progressive, is dormant in the context of insurance law.

In *Williams* v. *Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765 (1967), the Kansas Court, in defining what is a dormant disease, quoted with specific approval

a leading decision on the question, *Hooper v. Insurance Co.*, 166 Mo. App. 209, 148 S.W. 116 (1912), which held that accidental aggravation of advanced arterial disease in an otherwise healthy and non-disabled insured, resulting in death, requires the insurer to pay accidental death benefits. The admitted fact that the disease was progressive in the sense that death therefrom could have occurred at any time is insufficient to avoid liability if an accident has aggravated the disease and thus caused death to occur sooner:

> " 'Notwithstanding Hooper was fatally diseased in heart and brain, and notwithstanding his death was from apoplexy, yet if he accidentally fell in the car and ruptured a blood vessel, which caused the apoplectic stroke, his death would be accounted as accidental. For, if a man is so afflicted that he will die from such affliction, within a few hours, yet if by some accidental means his death is caused sooner, it would be a death from accident.' "[6]

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6. Many other states, including states in the Tenth Circuit, follow the same rule. E.g., *Whitlock* v. *Old American Insurance Company*, 21 Utah 2d 131, 442 P.2d 26 (1968), applying *Hooper*, holds that progressive, terminal cancer is no defense if the accident aggravates the disease and accelerates death.

Specifically applying the same principle to cases of arteriosclerosis are *New York Life Insurance Company* v. *McGehee*, 260 F.2d 768, 773 (5 Cir. 1958); *Richard* v. *Southern Farm Bureau Casualty Ins. Co.*, 128 So.2d 806 (La. App. 1961); *Life and Casualty Ins. Co. of Tenn.* v. *Jones*, 230 Ark. 979, 328 S.W.2d 118 (1959), as a few examples of this widespread line of decisions adhered to in many states.

Although the issue of dormancy of insured's osteoarthritis had been submitted to the jury in the Kansas *Williams* case, this was because insurer had evidence that insured was disabled from the disease prior to the accident, and the insurance policy provided disability benefits. The Kansas Court specifically recognized that the admitted fact insured's osteoarthritis was progressive and would have resulted in disability later, was no defense (200 Kan. at 57, 434 P.2d at 770), thus applying the holding in *Hooper*, which it quoted and approved. Therefore, the fact that Embry's arteriosclerosis was progressive and would have caused death at a later time is no defense to Equitable because the accident aggravated the disease and caused his death, as found by the binding judgment of the state court.

The Court of Appeals pointedly failed to refer to, or apply, the governing Kansas law directly applicable to this case. Its decision violates the mandate of the Rules of Decision Act, 28 U.S.C. § 1652. In doing so, the Court denied Mrs. Embry equal protection of law, resulting in the pernicious discrimination condemned by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). The Court of Appeals' "convenient mode of brushing aside" Kansas law is a direct "invasion of the authority of the state and, to that extent a denial of its independence." *Erie R. Co.* v. *Tompkins*, 304 U.S. at 78, 79. As to the law of this case, "the authority and only authority is the state, and if that be so, the voice adopted by the state as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." *Erie R. Co.* v. *Tompkins*, 304 U.S. at 79, quoting Justice Holmes.

With most insurers being in a position to establish diversity of citizenship, it is evident that this case affects millions of citizens who may become entitled to accidental indemnity benefits under life, disability and health and accident policies of every kind. By removing to federal court, insurers can avoid what they consider undesirable law enunciated by the several states.

This Court should stand resolutely against this erosion of the constitutional and statutory rights of its citizens.

CONCLUSION

The posture of this case readily lends itself to a decision on the questions presented. The Court of Appeals' failure to give full faith and credit to the state court judgment is evident from the opinion itself. On the question of dormancy, Kansas law is clearly and unmistakably in conflict with the opinion below.

Whether the doctrine of collateral estoppel is included in the full faith and credit clause of 28 U.S.C. § 1738 is a question of universal, continuing importance to the federal judiciary, which should be definitively decided by this Court, in an era when the complexity of litigation frequently encompasses different causes of action between the same parties, wherein common issues of fact are often presented. And in an age when over-burdened federal courts are filled with cases entirely governed by state law, these basic principles of our federal-state system could well be clarified, redefined and revitalized by this Court in this case.

The Writ of Certiorari should be granted.

Respectfully submitted,

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*Counsel upon whom service is to be made.